No. 83-93

In the Supreme Court of the United States

OCTOBER TERM, 1982

REBECCA P. SCHWANECKE, M.D., F.A.A.P., as Next Friend for Certain Minor Unborn Children and Certain Minor Recently Born Children, for and in behalf of such Minor Children, as a Class,
NANCY BRECHEISEN, BONNIE B. DUESING and MARGIT M. WINSTROM, M.D., Residents and Taxpayers of Harris County, Texas,

Petitioners,

v.

HARRIS COUNTY HOSPITAL DISTRICT, a governmental body or political subdivision of the State of Texas,
HARRIS COUNTY, a political subdivision of the State of Texas,
HARRIS COUNTY COMMISSIONERS COURT, a governmental body of Harris County, Texas,
COMMISSIONERS THOMAS BASS, R.Y. ECKELS, JAMES FONTENO and E.A. LYONS, in their official capacities, and
HARRIS COUNTY JUDGE JON LINDSAY and HARRIS COUNTY TREASURER HENRY E. KRIEGEL, in their official capacities,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE TENTH SUPREME JUDICIAL DISTRICT OF TEXAS

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether *Roe v. Wade*, 410 U.S. 113 (1973), and other abortion decisions of this Court operate to deny or to preclude Petitioners' causes of action for declaratory and injunctive relief against the Respondents, who are certain local Texas governmental units and officials, for the violation of their constitutional rights resulting from the complained of *actual abortion activities* by the Respondent Harris County Hospital District as *furthered by* the taxation and other activities of the remaining Respondents;

2. Whether such decisions operate to deny or to preclude Petitioners' cause of action against the Respondents for violating certain Texas criminal anti-abortion law revived as a legal effect of *Roe v. Wade*, such law having been carried forward from the laws of the Republic of Texas into the laws of the State of Texas by the 1845 Annexation Accord between the Republic and the United States;

3. Whether this Court should reconsider and overrule *Roe v. Wade* and *Doe v. Bolton*, 410 U.S. 179 (1973), in light of:

- the existence of important factual matters presented by this case which were not before the Court in *Roe* and *Doe*;
- the existence of important consequences which were unintended by this Court in *Roe* and *Doe*;
- the existence of important factual errors or omissions in *Roe*;
- the existence of procedural and substantive constitutional errors in *Roe* and *Doe*; and
- the absence of personal jurisdiction over (a) Children who survive abortion only to die as a direct or indirect result thereof and (b) Unborn Children threatened and endangered with death by abortion; and

4. Whether Children born alive after abortions and Unborn Children threatened and endangered by abortion have legal statuses under, and may claim the protections of, the 5th, 9th and 14th Amendments to the U.S. Constitution.

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TABLE OF AUTHORITIES

I. *U.S. Cases:*

OPINION BELOW

The opinion of the Court of Appeals (Pet. App. "A") is not reported.

JURISDICTION

The Judgment of the Court of Appeals (Pet. App. "B") was dated and entered on September 9, 1982. A timely Motion for Rehearing, as amended, was overruled by that Court on October 7, 1982 (Pet. App. "C"). On March 30, 1983, the Supreme Court of Texas refused Petitioners' timely Application for a Writ of Error with the notation, "No Reversible Error" (Pet. App. "D").[1] A timely Motion for Rehearing was overruled by that Court on May 4, 1983 (Pet. App. "D"). The jurisdiction of this Court is invoked under 28 U.S.C. 1257(3).

U.S. CONSTITUTIONAL AND TEXAS ANNEXATION ACCORD PROVISIONS INVOLVED

These data, which are lengthy, are set forth in Appendix "E" hereto. The U.S. Constitutional provisions are cited as Articles III and VI, and the 5th, 9th, 10th and 14th Amendments. The Texas Annexation Accord provisions are cited as 5 U.S. Stats. at Large 797-798 (1845), 9 U.S. Stats. at Large 108 (1845), Tex. Const. of 1845, Arts. 7, § 20, and 13, §§ 3 and 13, Tex. Joint Res. (1845) and Tex. Ord. (1845).

STATEMENT OF THE CASE

In October 1979, the Petitioners[2] sued the Respondents in a

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[1] The "No Reversible Error" (or "n.r.e.") notation means that the Supreme Court is "not satisfied" that the Court of Appeals has stated the law correctly on all points, but that the Application for a Writ of Error does not present error requiring reversal of the Judgment (Rule 483, Tex. R. Civ. Proc.). Where this occurs, as here, the Judgment of its Court of Appeals does not become the Judgment of the Texas Supreme Court. E.g., *Commercial Standard Ins. Co. v. Marin*, 488 S.W. 2d 861, 864 (Tex. Civ. App.—San Antonio, 1972), err. ref. n.r.e.

[2] While the District Court refused to certify the Children Class under Rule 42, Tex. R. Civ. Proc., it did not deny Class recognition under the permissive joinder provisions of Rule 40, Tex. R. Civ. Proc., as averred in Plaintiffs' Second Amended Original Petition (Tr. 6). The averred Taxpayer Class, however, is not before this Court since the District Court refused to certify same under said Rule 42 (Tr. 132-133) and the Court of Appeals dismissed

Texas District Court in Houston, Harris County, Texas, for declaratory and injunctive relief (primarily) to prohibit the performance of abortions affecting Petitioners at the facilities of Respondent Harris County Hospital District ("District"), to prohibit the use of property tax funds for such purposes, and to require the Harris County Commissioners Court ("Commissioners Court") to exercise its supervisory authority over the District to halt the complained of abortion conduct (Tr. 2-36, 201-236). Respondents filed certain Pleas in Abatement and Bar (Tr. 38-41, 42-46). In May 1980, the District Court granted the Pleas and dismissed the case as to Respondents Harris County and Harris County Treasurer Henry E. Kriegel, but overruled such Pleas as to the remaining seven Respondents (Tr. 102). Subsequently, the remaining Respondents, through their Attorneys, stipulated to the material facts of the case (Tr. 134-136 and Exhibit "A" thereto), and each side moved for summary judgment. On July 6, 1981, the District Court, after a hearing, dismissed the suit on grounds of mootness. See Tr. 375-376.

On appeal, the Court of Appeals reversed and remanded in part and dismissed in part. While holding that the case was not moot, the Court ruled that Petitioners had not pleaded a cause of action "under existing law," and that the cause be remanded [so that the Petitioners could be given an opportunity to plead a cause of action if they could (Pet. App. "A," p. 8)]. While the Court recognized that this Court, in *Roe v. Wade*, 410 U.S. 113 (1973), and *Doe v. Bolton*, 410 U.S. 179 (1973), "creat[ed] rights where none had previously been recognized," it said that the decisions of this Court in *Roe*, etc. were the "law of the land" and bound that Court and the Petitioners (*Id.* at 2, 8).[3] Subsequently, the Supreme Court of Texas refused Petitioners' Application for a Writ of Error (from certain portions of such Judgment) with the notation, "No Reversible Error" (Pet. App. "D").

Appellants' appeal therefrom. [The appeal was also dismissed as to the District Court's refusal to certify the Children Class, above, and to appoint a guardian ad litem for Members of such Class (Tr. 132-133).]

[3] For the dismissal aspect of the Court's holding, see footnote 2, *supra*.

The pertinent facts are these:

1. *The Petition.* In their Third Amended Original Petition (filed in April 1981), which was the operative Petition at the time the District Court rendered its Judgment ("Petition"), Petitioners averred that abortions which affecte adversely the Children Class (consisting of certain Unborn Children and Recently Born Children who "survived" the abortions)[4] were being performed unlawfully and unconstitutionally at District facilities and with the use of property tax funds; that all of the Respondents assisted directly or indirectly in such abortion activities; that the Recently Born Children so affected ("Abortion 'Survivors'") were U.S. and Texas Citizens; that the affected Unborn Children possessed legal or juristic personalities under the U.S. Constitution; that the complained of abortion conduct violated the rights of such Children to life, liberty and property under the 9th and 14th Amendments to the U.S. Constitution, under Article VI (supremacy clause) of the U.S. Constitution, under Texas law as authorized by the Division of Powers Concept of the U.S. Constitution and as guaranteed by the 10th Amendment thereof, and under the prior Texas anti-abortion law of U.S. Constitutional stature under Article VI (supremacy clause) revived as a legal effect of *Roe*, assuming *Roe* to be a lawful decision for this purpose; that property tax funds paid by the Taxpayer Petitioners (three individual property taxpayers and an averred Taxpayer Class) were being used unlawfully and unconstitutionally to further such abortion conduct; and that the Judgments and Decisions in *Roe* and *Doe* were void as violative of the U.S. Constitution and Fundamental Principles of Personal Jurisdiction.

2. *Respondents' Pleas in Abatement and Bar.* In their Pleas in Abatement and Bar, Respondents averred, in part, that "under Texas law, and the U.S. Constitution, an unborn, non viable fetus ha[d] no legal status which may be represented by

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[4] Under Texas law, Unborn Children and Born Children may comprise a class of Plaintiff-litigants. *Mitchell v. Mitchell*, 244 S.W. 2d 803, 804 (S.C. Tex., 1951). Further, Unborn Children may comprise a class of defendant-litigants and be the only defendants in the case. *Bradley v. Henry*, 239 S.W. 2d 404 (Tex. Civ. App.—Fort Worth, 1951), no writ.

Plaintiffs," and that the "purported cause of action" stated in Plaintiffs' Original Petition "was placed to rest" by the decisions of this Court in *Roe* and *Doe* (Tr. 38, 42-43). These Pleas were granted as to Respondents Harris County and Kriegel, but overruled as to the remaining seven Respondents (Tr. 102).

3. *Certain Stipulated Facts.* After *Roe v. Wade* was decided, the District, through its Board of Hospital Managers, adopted and later amended certain policies which permit abortions to be performed at its facilities and within the guidelines of *Roe*. Pursuant thereto, abortions and/or abortion procedures "have been, are being and may be performed" at such facilities (Tr. 134). For some years prior to June 1981, the District operated an abortion clinic, called the Voluntary Termination of Pregnancy Clinic ("VTP Clinic"), at its Jefferson Davis Hospital, and the "great majority" of such abortions were performed at the VTP Clinic (*ibid.*). The District furnished limited services, equipment, supplies, etc. for abortion purposes (Tr. 135).

The Commissioners Court levies property taxes for the District, using the Harris County tax rolls (Tr. 135).[5] These taxes are collected by the Tax Assessor-Collector of Harris County and are deposited to the District's depository after statutorily authorized fees are taken (Tr. 136). The Commissioners Court approved the District's Operating Budgets for 1978, 1979 and 1980,[7] and such Budgets included funds for the VTP Clinic (Tr. 135).[8]

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[5] The District is funded primarily by property tax revenues. See Tr. 311, 313, 314, 316.

[6] An amendment to the statute eliminated the fees deduction.

[7] The authority of the Commissioners Court to levy such taxes and approve such budgets is contained in Article 4494n, §§ 2 and 8, *V.T.C.S.*

[8] Petitioners Brecheisen, Duesing and Winstrom paid (and pay) property taxes to or for the benefit of the District (Tr. 195-200). Under Texas law, Taxpayers have standing to challenge, as here, the lawfulness of expenditures of tax funds to which they paid in part. E.g., *Scott v. Graham*, 292 S.W. 2d 324, 329 (S.C. Tex., 1956). Even a single taxpayer has standing to prevent the illegal diversion of tax monies "no matter how small" the amount of

4. *Medical Evidence.* Human life begins at conception, which is that point in time when the male sperm cell impregnates the female egg cell (Tr. 82). At that time, the "new being" receives half of the chromosomes from each parent and has an "absolutely unique hereditary plan" (*ibid.*). This new life is controlled by an individual genetic code.

The unborn child is alive, human and has a distinct being (Tr. 83, 86). The early development of the unborn child is presented (Tr. 83-84, 86).

Sometimes children are born alive after abortions caused by the administration of saline or prostaglandin. In abortions by hysterotomy (caesarean section), the child will be removed alive if alive when the operation begins (Tr. 88). "Children are born or brought forth alive after abortions in Harris County, Texas, and are in need of immediate medical attention***" (Tr. 88).[9]

5. *Closure of the District's Abortion Clinic.* On May 14 and June 4, 1981, the Commissioners Court disapproved the District's proposed Operating Budget for Fiscal Year 1981-1982 because it included funds for abortions (Tr. 253, 296, 301). This Budget earmarked $127,000 for the VTP Clinic, but did not identify funds for abortions other than at the VTP Clinic (Tr. 326, 336, 346 and 356). On June 8, the District, through its Board of Hospital Managers, *inter alia,* eliminated "under protest" the budgeted funding for the VTP Clinic. On the following day the Commissioners Court approved the revised Budget, and the District closed its VTP Clinic (Tr. 296, 307).

6. *The Continuation of Abortion Activities.* Abortions affecting adversely the Petitioners continued at District facilities after the closure of the VTP Clinic (Affidavit of "J. Roe" dated August 25, 1981).[10] Two of these abortions resulted in live

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affected taxes he has paid. *Terrell v. Middleton,* 187 S.W. 367, 369 (Tex. Civ. App.—San Antonio, 1916), err. ref.

[9] The record discloses various adverse physical, medical and psychological consequences of abortion (Tr. 88-89). Abortion does "natural violence to the normal functioning of the female reproductive system" and is "contrary to human nature and human science and biology" (Tr. 89).

[10] In an original proceeding in the Court of Appeals, Appellants attempted unsuccessfully to secure a temporary injunction to prohibit abortions affect-

births, a Boy in July 1981 and a Girl in September 1981. The Boy—aborted because of diagnosed trisomy 21 (Downs Syndrome)—died in an unheated incubator, after "flesh and tissue, about the size of quarters, were sliced and removed from his right and left thigh areas (apparently for use as tissue samples for study)" and "three needle-size puncture wounds were made to or near his heart" (*Ibid.*). Mucus was not drained from his nose or throat. The Girl died 8 days after her birth.

7. *Federal Questions.* The federal constitutional issues presented by this case were introduced by the Petition. In addition, Respondents relied upon *Roe* and *Doe* in their Pleas in Abatement and Bar (Tr. 38, 42). The District Court granted, etc. said Pleas as to two Respondents, but overruled same as to the remaining seven Respondents (Tr. 102-103). It did not rule on the motion and cross motion for summary judgment. Instead, it dismissed the cause as moot.

On appeal, Petitioners challenged, in part, the granting of said Pleas and the refusal to certify the Children Class under Rule 42, *T.R.C.P.* Petitioners argued, in part, that *Brady v. Doe*, 598 S.W. 2d 338 [Tex. Civ. App.—Houston (14th Dist.), 1980], err. ref. n.r.e., *cert. denied*, 449 U.S. 1081, *reh. denied*, 450 U.S. 960, which relied upon *Roe v. Wade*, was not controlling on such Class certification question, was distinguishable, was nonauthoritative and was void; that *Brady* was void because its predicate, *Roe v. Wade*, was void; and that, in *Roe* and *Doe*, this Court violated or permitted to be violated numerous provisions of the U.S. Constitution.

The Court of Appeals dismissed, for lack of jurisdiction, the appeal on the refusal to certify point, and overruled, without opinion, the appeal points in the granting of said Pleas (Pet. App. "A," p. 9). Relying on *Roe*, etc., the Court ruled that

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ing the Children Class pending appeal to that Court, and this Court denied certiorari from the order of the Court of Appeals and later denied rehearing. *Schwanecke v. Harris Co. Hosp. Dist.*, No. 10-81-150-CV (Tex. App. 10th—Waco, 1981), *cert. denied*, 455 U.S. 1019 (1982). Two previous similar attempts —before an appeals court in Houston (before which the appeal in this case was pending at such time)—also were unsuccessful. In addition, the Court of Appeals in this case overruled a separate motion for a temporary injunction to prohibit such abortions pending the appeal.

Petitioners had not pleaded a cause of action "under existing law" (*Id.* at 7-8).

In their Application for a Writ of Error, as supplemented, Petitioners raised all matters sought herein to be reviewed *except*, of course, they did not request the Supreme Court of Texas (or any other Texas Court) to overrule *Roe* and *Doe*. Petitioners preserved the federal questions in their Motion for Rehearing which was overruled.

ARGUMENT

I.

Petitioners Pleaded Numerous Causes of Action Under Existing Law Against Local Government Entities and Officials For Their Complained of Abortion Conduct, with Roe v. Wade and Other Decisions of This Court Being Distinguishable Therefrom

Relying on decisions of this Court in *Roe, Planned Parenthood of Central Missouri v. Danforth*, 418 U.S. 52 (1976) and possibly *Doe v. Bolton*, the Court of Appeals held that Petitioners had not pleaded a cause of action "under existing law" (Pet. App. "A," pp. 7-8). This was clear error.

A. *Petitioners' Causes of Action Were Not Denied or Precluded by the Abortion Decisions of this Court. Roe, Doe* and *Danforth* do not operate to deny or preclude the causes of action which Petitioners pleaded because the complained of conduct, *unlike* that presented in such cases, is direct, *public* abortion conduct by a unit of local Texas government, as aided by other units and officials of local Texas government. It is *not* that of a *private* patient/physician nature or of state regulatory modification thereof, as presented by *Roe, Doe* and *Danforth*. This Court has made it quite clear that *Roe* is *not* to be applied to situations which, as here, were not before, or decided by, the Court in *Roe. Connecticut v. Menillo*, 423 U.S. 9, 10-11 (1975).

Moreover, this Court has *never* recognized the propriety of *direct* abortion conduct by a state, such as that presented by this case, where the District *ran* an abortion clinic, where tax funds were *earmarked for* and *used in* the operations of such clinic, where abortions were continued at District facilities *after* such clinic was closed, including the live *human experimenta-*

tion upon, and *murder of*, a Boy who survived an abortion at such facilities, and where abortions were (and continue to be) authorized by current *District policy* throughout the entire length of pregnancy. Such conduct raises substantial constitutional/legal issues not present in a *private* patient/physician setting. The state has duties, interests and concerns that are *not* shared by the pregnant female and her physician. For example, abortion activity by a state:

- wars against its basic duty to protect human life, including the lives of Children who "survive" abortions (e.g., U.S. Declaration of Independence, July 4, 1776; U.S. Const., 14th Amend., § 1);
- contradicts its "important and legitimate interest in protecting the potentiality of human life," whether before or after the "compelling" point of viability (*Roe v. Wade, supra*, 410 U.S. at 162-163);
- contravenes its "strong and legitimate interest" in encouraging childbirth or normal childbirth *[Beal v. Doe*, 432 U.S. 438, 445-446 (1977)*]*;
- contravenes its "important and legitimate interest in preserving and protecting the health of the pregnant woman" (*Roe*, 410 U.S. at 162), including physical, emotional and psychological effects of abortion; and
- contradicts substantial state law and policy, statutory and judicial, which provides to, or recognizes in, Unborn Children and Abortion "Survivor" Children rights under property, tort and other state law.

While a state may restrict or prohibit most abortions in public facilities *[Poelker v. Doe*, 432 U.S. 519, 521 (1977)*]* and may restrict or prohibit funding for most abortions *[Williams v. Zbarez*, 438 U.S. 358, 368-369 (1980); *Maher v. Roe*, 432 U.S. 464, 474-475, 479-480 (1977)*]*, it does *not* follow that the state may engage in abortion conduct and fund the same with public monies. Not only was such an issue *not* presented by such cases, but all of the states there involved were attempting *to preserve* human life and *to restrict* abortion conduct.

B. *Petitioners Pleaded Numerous Causes of Action Under Existing Law*. The Petition averred, in essence, that the District was

performing and/or aiding or assisting directly in the performance of abortions or abortion procedures on the Natural Mothers of Members of the Children Class, in violation of the constitutional rights of the Members of such Class (discussed below); that tax monies paid by the Taxpayer Class (including the three Taxpayer Petitioners) were being used by the District for such abortion purposes; that the remaining Respondents were aiding or assisting such abortion activities through taxation, tax disbursement and other activities; that the use or expenditure of tax funds by the District for such abortion activities was unlawful and unconstitutional; and that all such abortion and tax expenditure conduct was violative of the rights of all Petitioners (Tr. 202-220, 229-231).[11] In short, the Respondents were charged with violating the constitutional rights of Members of the Children Class and, through expenditure or use of tax monies, the rights of the Taxpayer Petitioners. The constitutional right violations of Members of the Children Class may be summarized as follows:

1. *Rights Under the 14th Amendment.*

a. *Abortion "Survivors."* The Abortion "Survivor" Children in this case are U.S. and Texas Citizens and "persons" under Section 1 of the 14th Amendment to the U.S. Constitution. They are recognized expressly under Texas statutory law, and have the same rights, powers and privileges as are provided by Texas law to Children born alive after the normal gestation period. *Tex. Family Code,* § 12.05. They are entitled to support and substantial other rights and protections, and are individuals under the Penal Code. *Tex. Penal Code,* § 1.07(17).

It is axiomatic that the Respondents may not destroy, or participate in the destruction of, Abortion "Survivors," or

[11] Respondents Harris County and Kriegel are proper and necessary parties to the lawsuit, and the Court of Appeals erred in sustaining the District Court's dismissal of the suit as to them. Harris County tax rolls are used for the assessment of the property taxes here at issue, and Harris County personnel are used in the collection of such taxes (Tr. 135-136; Art. 4494n, § 2, *V.T.C.S.*). As Treasurer of Harris County, Respondent Kriegel is responsible to see that the District's share of the property tax collections is deposited to the District's depository. These Respondents are essential links in getting property tax funds to the District for unlawful usage by it, and they are needed for the granting of complete relief.

withold from them protections and rights provided by Texas law. U.S. Const., 14th Amendment (due process and equal protection clauses). Yet this exists when they die as a result of having been aborted or denied proper care. For the *murder* of an Abortion "Survivor" Boy at District facilities, see the Statement of the Case, *supra*.

b. *Unborn Children*. In like manner, they may not destroy, or participate in the destruction of, Unborn Children by abortion. Unborn Children are "persons" under said Amendment *because* (1) they meet this Court's test of 14th Amendment personhood as expounded in *Levy v. Louisiana*, 391 U.S. 68 (1968) (live, human and having a being), (2) they meet this Court's "biological" test of 14th Amendment personhood as expressed generally in *Glona v. Am. Guarantee & Liab. Ins. Co.*, 391 U.S. 73 (1968), and (3) they have legal personalities and numerous rights under substantial federal and state law.

Moreover, Unborn Children have clear personhood under the 14th Amendment *at least as applied to the states* because not only do the states have "important and legitimate" interests in protecting their lives, whether at the "compelling" point of "viability" or earlier (*Roe*, 410 U.S. at 162, 163), but they provide or recognize substantial rights in them.[12] As here applied, Texas may *not* repudiate such interest, *nor* may it wage war on its own law. The reach of the due process and equal protection provisions of the 14th Amendment is broad, and covers *at the very least* the legal entities which the State *itself* recognizes and affirms. "Due process" and "equal protection" standards thereunder are *not* met by the governmental destruction of Unborn Children here at issue.

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[12] For example, under Texas law a duty of care is owed to an Unborn Child under the prenatal tort injury doctrine *[Yandell v. Delgado*, 471 S.W. 2d 569 (S.C. Tex., 1971)*]*; a post first trimester Unborn Child may be represented in proceedings which affect the parent/child relationship (*Tex. Family Code*, §§ 11.10(a), 15.021); an Unborn Child may be represented in judicial proceedings for the wrongful death of his father and take an award before birth *[Brantley v. Boone*, 34 S.W. 2d 409, 411 (Tex. Civ. App.—Eastland, 1931), no writ*]*; a temporary guardian may be appointed for an Unborn Child *[Tex. Probate Code*, § 131 (Sup. Tr.1-4)*]*; and a posthumous child may take under a will *[Guilliams v. Koonsman*, 279 S.W. 2d 579, 581 (S.C. Tex., 1955)*]*.

2. *Rights Under the 9th Amendment.* The unenumerated rights which are reserved to the "people" and guaranteed by the 9th Amendment to the U.S. Constitution include the basic right to live. Abortion "Survivors" clearly are part of the "people" whose life rights are guaranteed by said Amendment. Unborn Children have the same posture thereunder. When the 9th Amendment was adopted, Unborn Children had (and still have) well recognized statuses and rights postures. "Property does not have rights. *People have rights.*" *Lynch v. H.F.C.*, 405 U.S. 538, 552 (1972). (Emphasis added.) It is proper to construe the Constitution in light of the common law. *United States v. Wong Kim Ark*, 169 U.S. 649, 654 (1898).

When the 9th Amendment was adopted in 1791, the life of a natural "person" was considered as beginning "as soon as an Infant was able to stir in the mother's womb" [I Blackstone, *Commentaries on the Laws of England* (c. 1765), pp. 123, 129], and this life received protection not only by the execution reprieve rule, which this Court recognized expressly almost a century ago [*Union Pac. Ry. Co. v. Botsford*, 141 U.S. 250, 253 (1891)], but by the common law offenses relating to abortion.[13] These offenses were:

- murder or manslaughter if the female died as a result of the abortion [e.g., *Margaret Tinkler's Case* (c. 1781), I East, *A Treatise of the Pleas of the Crown* (Phil., 1806), pp. 230, 354-356];

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[13] The earliest reported abortion case in post-conquest England was in the year 1200. Other early cases appeared in the years 1202, 1203, 1206 and 1221. E.g., *Select Pleas of the Crown AD 1200-1225* (Selden Society, 1887), Case Nos. 82 (1200), 26 (1202) and 73 (1203), pp. 39, 11 and 32, respectively. The four editions of *Boke of Justyces of Peas* (1506?, 1515, 1521 and 1544) contain an indictment which charged, *inter-alia*, the felonious slaying of an unborn child. An interesting conviction for abortion occurred in the Court of Star Chamber during the reign of Elizabeth I. *Star Chamber Cases* (Soule and Bugbee) (Boston, 1881), reprinted from the edition of 1630 or 1641, pp. 19-21. Abortion remained an offense up to the enactment of Lord Ellenborough's Act in 1803, where abortion was first made a statutory offense in England. See III Chitty, *A Practical Treatise on the Criminal Law* (London, 1816), pp. 798-801. Abortion was also an offense in Scotland. See I *Select Judiciary Cases 1624-1650* (The Stair Society, Edinburgh, 1953), p. 81.

- murder or manslaughter if the child was born alive and died as a result of the abortion *[see, e.g., Sim's Case,* 75 E. Repts. 1075 (Q.B., 1601)*]*; and
- heinous misdemeanor, etc. if a live Unborn Child, i.e., one who "was able to stir in the mother's womb," was killed by abortion (I Blackstone, *op. cit.*, p. 129).[14]

On the civil side, the legal status and rights posture of an Unborn Child was recognized by a substantial body of English law, statutory and case. E.g., 12 Ch. II, c. 24, §§ VIII and IX (1660) (representation by a testamentary guardian, with authority to sue, etc.); *Reeve v. Long,* 83 E. Repts. 754 (H. of Lords, 1695) (vesting of a remainder interest in realty), as codified in 10 & 11 Wm. III, ch. 16 (1699); *Lutterel's Case,* (c. 1660), referred to in *Hale v. Hale,* 24 E. Repts. 25, 26 (Ch., 1692) (representation and award of an injunction to stay waste of property interests). The Unborn Child was considered a "Person in rerum Natura" *[Wallis v. Hodson,* 27 E. Repts. 642, 643-644 (Ch., 1740)*]*, was "in esse, according to the rule of the civil law" *[Millar v. Turner,* 27 E. Repts. 907, 908 (Ch., 1747-1748)*]*, had "an existence in the eye of the law" *[Burdet v. Hopegood,* 24 E. Repts. 484 (Ch., 1718)*]*, was "living***in ventre sa mere" *[Beale v. Beale,* 24 E. Repts. 373 (Ch., 1713)*]*, etc.

The Unborn Child received similar legal recognition, protection and treatment in the United States, and from an early date. I Swift, *A System of Laws of the State of Connecticut* (1795), pp. 176-178 (protection against abortion);[15] *State v. Arden,* 1 S.C. 196, 197 (S.C.S.C., 1795) (execution reprieve); *Hall v. Hancock,* 33 Mass. (15 Pick.) 255, 257-259 (S.J.C. Mass., 1834) (legal status and interest in residue of personal property under a will). The legal status and rights posture of an Unborn Child in this country continued and was expanded, particularly in the area of tort and compensatory law. E.g., *Crisfield v. Storr,* 36 Md. 129, 146 (Ct. App. Md., 1872) (vesting of a remainder

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[14] "Blackstone's Commentaries are accepted as the most satisfactory exposition of the common law of England." *Schick v. United States,* 195 U.S. 65, 69 (1904).

[15] "*[I]*n the early years of our country's existence the English common law of abortion was in force in virtually every state***." II *Wharton's Criminal Law*

interest in realty); *Medlock v. Brown*, 136 S.E. 551, 553 (S.C. Ga., 1927) (vesting of a beneficial interest in a trust); *Utah Copper Co. v. Indus. Com. of Utah*, 193 P. 24, 33-34 (S.C. Utah, 1920) (representation and entitlement to part of a workmen's compensation award); *Raleigh Fitkin-Paul Morgan Mem. Hosp. v. Anderson*, 201 A. 537, 538 (S.C.N.J., 1964), *cert. denied*, 337 U.S. 985 (representation and right to have mother undergo life-saving blood transfusions); *Jefferson v. Griffin Spaulding Co. Hosp. Auth.*, 274 S.E. 2d 457, 459, 460 (S.C. Ga., 1981) (representation and right to have mother undergo a needed caesarean operation).

Moreover, since Abortion "Survivors" and Unborn Children are *beneficiaries* of numerous rights and interests provided by the "people" under state law, the destruction of such rights by the state itself constitutes an abridgement of the 9th Amendment rights of the *other* people of that state to provide or recognize such rights in such Children. Accordingly, the State of Texas may not destroy the very rights which it provides to, or recognizes in, Unborn Children. See, e.g., footnote 12, *supra*.

3. *Rights Under Federal Statutory Law.* The complained of conduct destroys substantial rights which the Children Class Petitioners have under certain federal statutory law which, of course, is part of the supreme law of the land. Abortion "Survivors" and Unborn Children have rights under such statutory law. Unborn Children have rights, for example, under (1) the Social Security Act, Subchapter II, 42 U.S.C. 401 *et seq.* (insurance benefits); *Wagner v. Finch*, 413 F. 2d 267, 268-269 (C.A. 5, 1969); *Adams v. Weinberger*, 521 F. 2d 656,

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(14th ed., by Charles E. Torcia) (1979), § 250, p. 415. Abortion was prosecuted as a common law crime. *Mills v. Commonwealth*, 13 Pa. St. 630, 632 (S.C. Pa., 1850); *State v. Slagle*, 82 N.C. 566 and 83 N.C. 544 (S.C.N.C., 1880); *Commonwealth v. Demain*, 6 Pa. L.J. 28, 31 (S.C. Pa., 1846); see *Commonwealth v. Bangs*, 9 Mass. 386 (S.J.C. Mass., O.T., 1812); *Commonwealth v. Parker*, 50 Mass. 263 (S.J.C. Mass., March Term, 1845); *Fondren v. State*, 169 S.W. 411, 414 (Tex. Crim. App., 1914). Moreover, the common law offense of abortion was recognized in some states *after* enactment of their respective anti-abortion statutes. *People v. Jackson*, 3 Hill 92, 94 (S.C.N.Y., May Term, 1842); *State v. Reed*, 45 Ark. 333, 334 (S.C. Ark., 1883); *Commonwealth v Kelsea*, 157 A. 42 (Supr. Ct. Pa., 1931).

660-661 (C.A. 2, 1975); (2) the Social Security Act, Subchapter IV, 42 U.S.C. 601 *et seq.* (ADC benefits); 45 C.F.R. 233.909 (c)(2)(ii); *In the Matter of Diane Catoe v. Lavine*, 378 N.Y.S. 2d 623, 626 (N.Y. App. Div., 2nd Dept., 1976), *motion for leave to appeal denied*, 386 N.Y.S. 2d 1027; (3) the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. 901 *et seq.* (compensation benefits); *Tex. Employers' Ins. Ass'n. v. Shea*, 410 F. 2d 56, 61, 62 (C.A. 5, 1969); and (4) the Federal Tort Claims Act, 28 U.S.C. 1346(b), 2674 (damages for negligence, including prenatal torts); *Sox v. United States*, 187 F. Supp. 465, 469, 470 (E.D.S.C., 1960).

4. *Rights Under Texas Law Authorized Under the Division of Powers Concept and Guaranteed by the 10th Amendment.* The complained of conduct violates rights of Abortion "Survivor" and Unborn Children under substantial Texas law authorized under the Division of Powers Concept of the U.S. Constitution and guaranteed to the State under the 10th Amendment thereof. "Family relations are a traditional area of state concern." *Moore v. Sims*, 442 U.S. 415, 435 (1979). Within this sphere of authority, Texas has enacted substantial law which recognizes, for example, the legal status and rights posture of an Abortion "Survivor" (*Tex. Family Code*, § 12.05); authorizes the Department of Human Services to intervene on behalf of an Abortion "Survivor" (*Id.*, § 17.011); extends the criminal law to an individual who is born alive *[Tex. Penal Code*, § 1.07(17)*]*; authorizes a suit to terminate the parent/child relationship after the first trimester of pregnancy (*Tex. Family Code*, § 15.021); requires that the unborn child be represented in such a suit with exceptions not here pertinent *[Tex. Family Code*, § 11.10(a), 15.021*]*; provides for the inheritance rights of children, including those (posthumous children) who were unborn at the time of the death of the person through whom the inherited property passes *[Tex. Probate Code*, § 41(a)*]*; and authorizes an unborn child to take an award under the Texas Wrongful Death Act *[*Art. 4675 *et seq., V.T.C.S.; Brantley v. Boone, supra*, 34 S.W. 2d at 411; see *Nelson v. Galveston, Houston & S.A. Ry. Co.*, 14 S.W. 1021, 1023 (Tex. Com. App., 1890), *opinion adopted*, 14 S.W. 1024 (S.C. Tex.)*]*. The Respondents may *not* destroy these rights by abortion.

5. *Rights Under Texas Law Which Derives from the Law of the Republic of Texas.* The complained of conduct violates certain existing Texas law which is of U.S. Constitutional status because it derives from law of the Republic of Texas which was brought forward into Texas State law by the 1845 Annexation Accord between the Republic of Texas and the United States. See 5 *U.S. Stats. at Large* 597, 598 (1845), 9 *U.S. Stats. at Large* 108 (1845) and Tex. Const. of 1845, Art. 7, § 20, and Art. 13, §§ 3 and 13 in Appendix "E," *infra.* For example, the right of a posthumous child to inherit real or personal property under Section 41(a) of the *Texas Probate Code* derives from Section 9 of the Act to Regulate the Descent and Distribution of Intestates' Estates, approved January 28, 1840, 2 Gam., *The Laws of Texas* at 308; and the right of a pretermitted or unprovided for posthumous child to take an intestate share of his or her father's estate per Section 67(a) of the *Texas Probate Code* derives from Section 3 of said Act.

6. *Rights Under Revived Texas Anti-abortion Law of U.S. Constitutional Status.* The legal effect of *Roe v. Wade,* which held unconstitutional certain Texas anti-abortion statutory law first enacted in 1854 (410 U.S. at 119, 164), operated to revive, under the doctrine of revival,[16] the *prior* Texas anti-abortion law. This prior law—consisting either of an 1828 English anti-abortion statutory provision which made it a felony to procure an abortion of a woman whether she was quick with child or not, but with more severe penalties where she was quick with child *[9* Geo. IV, c. 31, § XIII (1828)*]* or the common law proscriptions against abortion, above—is of Article VI status under the U.S. Constitution because it was carried forward into Texas law by the 1845 Annexation Accord between the Republic of Texas and the United States. See Section II of Appendix "E,", *infra.*

This Court never had a chance to consider this subject because, during the second oral argument in the case, Coun-

[16] E.g., *People ex rel Farrington v. Mensching,* 79 N.E. 884, 889-890 (Ct. App. N.Y., 1907); *Harrison v. State,* 527 S.W. 2d 745, 748 (Crim. App. Tenn., 1975), *cert. denied,* see 527 S.W. 2d 745; *Goines v. Rockefeller,* 338 F. Supp. 1189, 1195 (S.D. W. Va., 1972); 16 C.J.S., "Constitutional Law," § 101, pp. 469, 473.

sel for Henry Wade advised erroneously that Texas had not legislated on the subject of abortion before 1854 and indicated erroneously that, prior to 1854, it was *legal* to abort in the State (Tr. Oral Arg., *Roe v. Wade*, Oct. 11, 1972, pp. 67-68). However, the Republic of Texas adopted the English Common Law as the "rule of decision" for application "in all criminal cases" (Const. Rep. of Tex., 1836, Art. IV, § 13) and, by statute in 1836, provided that "all offenses known to the common law of England," as then understood and practiced, which were not provided for in that statute (and abortion was not provided for therein), were to be "punished in the same manner as known to the said common law" (Act Punishing Crimes and Misdemeanors, Sec. 54, approved December 21, 1836, 1 Gam., *The Laws of Texas* 1247, 1255). Thus, the English criminal law of abortion was adopted as law in the Republic in 1836.

These criminal law provisions formed part of the laws of the Republic which were carried forward into the laws of the State of Texas by the 1845 Accord. After Statehood, the Supreme Court of Texas declared that "[t]he common law in criminal cases, not provided for by legislative enactment, was introduced by the constitution of the republic, *and is still the law.*" *Grinder v. The State*, 2 Tex. 339, 340 (S.C. Tex., Dec. Term, 1847). (Emphasis added.)

This law, which existed in Texas immediately prior to the 1854 statutory provisions (contained in the Act supplemental to "An Act concerning Crimes and Punishments," etc., approved on February 9, 1854, 3 Gam., *The Laws of Texas* 1502), did not contravene the U.S. Constitution, the Joint Resolutions of the U.S. Congress concerning the annexation of Texas or the Texas Constitution of 1845. See *Dixon v. State*, 2 Tex. 482 (Dec. Term, 1847), where the constitutionality of a different section of said 1836 Act (§ 47) was upheld by the Supreme Court of Texas. The Annexation Accord is fully executed by the parties and cannot be changed. Only the Texas Legislature has the authority to change the laws of the Republic which were carried forward into the laws of the State of Texas. Tex. Const. of 1845, Art. 13, § 3. This revived Texas anti-abortion law operates to protect the Children Petitioners from abortion,

and the complained of conduct is in direct violation of such law and the rights of the Children thereunder.[17]

II
This Court Should Reconsider and Overrule Roe v. Wade and Doe v. Bolton

For the reasons and authorities set forth below, this Court should reconsider and overrule *Roe v. Wade*, 410 U.S. 113, and *Doe v. Bolton*, 410 U.S. 179. See *Erie R. Co. v. Tompkins*, 304 U.S. 64 (1938), overruling *Swift v. Tyson*, 16 Pet. 1 (1842); *Burnet v. Coronado Oil & Gas Co.*, 285 U.S. 393, 406-408 (1932) (Dissenting Opinion of Justice Brandeis).

A. *Important Factual Matters Were Not Before the Court in Roe and Doe.* This Case presents important factual matters which were not before the Court in *Roe* and *Doe*:

1. *Commencement of Human Life.* In *Roe*, this Court said that it "need not resolve the difficult question of when life begins" (410 U.S. at 159). Small wonder, since the *record* before the Court was *silent* on this subject.

In the instant case, however, there is uncontradicted scientific evidence that human life begins at conception (Tr. 82). Had this type of evidence been before the *Roe* Court, an *altogether different* question would have been presented, namely, whether the State of Texas was invested with sufficient constitutional authority to protect the *actual human lives* of Unborn Children in the State from death by abortion.[18]

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[17] By separate application for a TRO, etc., as amended, a cause of action was alleged for destroying Members of the Children Class by abortion *after* the Commissioners Court had disapproved the District's proposed 1981-1982 Operating Budget because it included funds for abortions. In Counts VI-IX of the Petition, Petitioners pleaded that *Roe* and *Doe* were void as violative of the U.S. Constitution and Fundamental Principles of Personal Jurisdiction. These latter areas are discussed in the constitutional errors portion of the Argument, below.

[18] The U.S. Declaration of Independence, July 4, 1776, makes it clear that the unalienable right to life begins at creation, not birth. "It is *always safe* to read the *letter* of the Constitution in the *spirit* of the Declaration of Independence." *Gulf, Colo. and Santa Fe R. Co. v. Ellis*, 165 U.S. 150, 160 (1887). (Emphasis added.)

2. *Essential Characteristics of Unborn Human Life.* The *record* in *Roe* was *devoid* of essential scientific evidence on the characteristics of unborn human life. Hence, there was no evidentiary base for application of this Court's 14th Amendment "personhood" standards of *Levy v. Louisiana, supra,* 391 U.S. 68 (1968), and *Glona v. Am. Guarantee & Liab. Ins. Co., supra,* 391 U.S. 73.

Such data are supplied by the instant case. The *record* herein is uncontradicted that the Unborn Child is human, is alive and has a distinct biologic being or entityship (Tr. 83, 86). As such, the Unborn Child meets squarely *both* the live, human being test of 14th Amendment personhood formulated in *Levy* and the biological basis of such personhood expressed in *Glona.* See *Weber v. Aetna Casualty & Surety Co.,* 406 U.S. 164 (1972). This *undercuts completely* the Court's 14th Amendment "nonpersonhood" holding for the Unborn in *Roe.* While that Amendment requires birth for *citizenship* status, no such requirement is present for *personhood* status. Personhood thereunder is a much broader concept and, as applied to natural persons, it means live human individuals, cognizable in law. The Unborn meet this test because they are living human beings with well recognized legal statuses under substantial Anglo-American jurisprudence. For decisions of this Court in this connection, see *Union Pac. Ry. Co. v. Botsford, supra,* 114 U.S. at 253 ("life of an unborn child" recognized in relation to an application of the writ *de ventre inispiciendo* at common law), and *McArthur v. Scott,* 113 U.S. 340, 391-392, 404 (1885) (unconceived children entitled to be represented in judicial proceedings affecting their possible rights). The biologic basis of such personhood has been furthered by recent scientific advances in the diagnosis *and treatment* of medical problems affecting the Unborn Child—as a *patient* of the physician.

3. *Deleterious Effects of Induced Abortion on Affected Females.* Evidence of deleterious effects of induced abortion on the females involved was not before the Court in *Roe.* This evidence—e.g., of emotional and psychological problems, higher incidences of sterility, and of spontaneous

abortion—is showing up. See Tr. 88-89. In *H.L. v. Matheson*, 450 U.S. 398 (1981), this Court declared that "[t]he medical, emotional, and psychological consequences of an abortion are serious and can be lasting***." 450 U.S. at 411. These data, examined *only* from the standpoint of the female, *undercut substantially Roe's* restrictions of state authority in promoting or preserving maternal health.

B. *Roe and Doe Have Produced Various Unintended Consequences. Roe* and *Doe* have produced consequences or results which this Court did not intend:

1. *Abortion on Demand.* In *Roe*, this Court made it clear that a pregnant woman does not have an absolute right to terminate her pregnancy "at whatever time, in whatever way, and for whatever reason she alone chooses" (410 U.S. at 153). The Constitution does not require "abortion on demand" (410 U.S. at 208, Burger, C.J., Concurring Opinion). In *Doe*, the Court said that "*Roe v. Wade, supra*, sets forth our conclusion that a pregnant woman does not have an absolute constitutional right to an abortion on her demand" (410 U.S. at 189). The opposite, as the Court may well take note, has occurred and continues. Well over one million unborn children are killed by abortion in this Nation each year. Abortion "Survivor" Children, who are U.S. Citizens, also die from abortion or its "ethic." In Texas, killing by abortion is "wide open" from conception to the commencement of childbirth. Even where a state proscribes abortion after viability, with life and health exceptions per *Roe*, the "health" meaning per *Doe* is so broad as to make such proscription more form than substance.

2. *Effect of Abortion and the Abortion "Ethic" on Children Who "Survive" Abortion.* Abortions and applications of the abortion "ethic" bring about deaths of U.S. Citizen Children who continue to live *after* they have been aborted. These Children die primarily as a result of prematurity, abortional injury or lack of care. Sometimes they are killed outright. In this connection, the appellate record shows that an Abortion "Survivor" *was murdered* at the District's Jefferson Davis Hospital on July 3, 1981, and another "Survivor" died on September 15, 1981, eight days after her birth at said Hospital. See the Statement of

the Case, *supra*. An Abortion "Survivor" lived for about 3 days at a non-District Hospital in Houston after his mother, allegedly during childbirth, was prescribed and took an abortifacient drug (Tr. 128-131). Moreover, since "unsuccessful" abortions (i.e., those resulting in live births) could translate into legal claims against the abortionists, etc., "success" is encouraged legally—to the naked detriment of Infant U.S. Citizens. *Stills v. Gratton*, 127 Cal. Reptr. 652, 657, 658-659 (Cal. App., 1st, 1976); see *The Ladies Center of Clearwater Inc. v. Reno*, 341 So. 2d 543 (Fla. App. 2d, 1977).

3. *Internal Legal Chaos*. *Roe* and *Doe* have introduced legal chaos in Texas and other domestic U.S. Jurisdictions relative to Unborn Children. They have legal recognitions and rights, yet they may be killed by abortion. Under Texas law, for example, an unborn child has legal rights of representation, protection against prenatal torts, and rights under property law. In a majority of U.S. Jurisdictions, a *stillborn child* who had reached the viability stage (or earlier, as in Georgia and Rhode Island) is a "person," etc. under their respective wrongful death or kindred statutes. Since *Roe* was decided, *thirteen* States have ruled or re-ruled to like effect.[19] Certain property interests may vest in an Unborn Child *[Gay v. Baker*, 58 N.C. 344, 345, 346 (S.C.N.C., 1860) (trust); *Crisfield v. Storr*, *supra*, 36 Md. at 145-146 (remainder in real property)*]*. A "duty of care" is owed to the unborn child under the prenatal tort injury doctrine, as recognized in all 51 domestic U.S. Jurisdictions. How can the "law" recognize a legal status and provide for or recognize legal rights in an Unborn Child when *Roe* and *Doe* authorize the child to be destroyed by abortion on demand? Should the existence and protectability of legally cognizable rights be made to depend upon the *character* of the one who seeks to destroy the same?

C. *Important Factual Errors, Etc. Were Made by the Court*. The Court made a number of factual errors in *Roe*, most of which influenced improperly the Court's main holdings:

1. *Erroneous Consideration of Texas as a Party*. In several places, the Court indicated that Texas was before the Court or

[19] *Eich v. Town of Gulf Shores*, 300 So. 2d 354, 358 (S.C. Ala., 1974)

was a party to the proceedings (410 U.S. at 116, n. 54 at 157, 159 and 162). This made it *appear* that a more comprehensive proceeding was conducted.

Not only was Texas *not* a party (e.g., Record, *Roe v. Wade*, p. 109) but it *could not have been* a party because there would have been *no constitutional jurisdiction* in the U.S. District Court to entertain such a case. It is well established that federal judicial authority, as circumscribed by the 11th Amendment to the U.S. Constitution, does *not* extend to a suit brought against a state in a U.S. District Court by a Citizen(s) of that state *unless*, of course, the state consents to such a suit. *Hans v. Louisiana*, 134 U.S. 1, 9, 10-15 (1889) (leading case). The Plaintiffs in *Roe* were Citizens of Texas; they sued Henry Wade, District Attorney for Dallas County, Texas, in a U.S. District Court; and the State of Texas had not consented to such a suit.

On the other hand, it is settled that an action brought in a U.S. District Court against a State Officer, challenging the constitutionality of a State statute or seeking to enjoin its enforcement on constitutional grounds, as in *Roe*, is *not* a suit against the State, and is not prohibited under the doctrine of sovereign immunity. *Ex parte Young*, 209 U.S. 123, 159-160 (1908); *Sterling v. Constantin*, 287 U.S. 378, 393 (1932). It is treated as against the Officer alone, and *Roe* was such a case.

2. *Erroneous Purpose Ascribed To State Anti-abortion Statutes in Late 19th and Early 20th Centuries.* As for the "original purpose" of State anti-abortion statutes, the Court said that "The few state courts called upon to interpret their laws in the late 19th

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("person" or "minor child"); *Chrisafogeorgis v. Brandenburg*, 304 N.E. 2d 88, 92 (S.C. Ill., 1973) ("person"); *Cox v. Cooper*, 510 S.W. 2d 530 (Ct. App. Ky., 1974) ("person"); *Danos v. St. Pierre*, 402 So. 2d 633, 637-639 (on rehearing) (S.C. La., 1981) ("person"); *Mone v. Greyhound Lines, Inc.*, 331 N.E. 2d 916, 920 (S.J. Ct. Mass., 1975) ("person") (overruling prior decision); *Pherson v. Kistner*, 222 N.W. 2d 334, 336 (S.C. Minn., 1974) ("decedent"); *Rainey v. Horn*, 72 So. 2d 434, 439-440 (S.C. Miss., 1974) ("person"); *Evans v. Olson*, 550 P. 2d 924, 928 (S.C. Ok., 1976) ("person") (overruling prior decision); *Libbee v. Permanente Clinic*, 518 P. 2d 636, 639 (S.C. Ore., 1974) ("person"); *Presley v. Newport Hospital*, 365 A. 2d 748, 754 (S.C.R.I., 1976) ("person"); *Vaillancourt v. Med. Center Hosp. of Vt.*, 425 A. 2d 92, 94 (S.C. Vt., 1980) ("person"); and *Moen v. Hanson*, 537 P. 2d 266, 267 (S.C. Wash., en banc, 1975) ("minor child"). In 1982, Idaho joined these States as well.

and early 20th centuries did focus on the State's interest in protecting the woman's health rather than in preserving the embryo and fetus" (410 U.S. at 151). It cited *State v. Murphy*, 27 N.J.L. 112, 114 (S.C.N.J., 1858), as an example authority for such statement. This statement and its context made it *appear* that the statutes were outdated *purpose-wise*, maternal health being protected by medical advances in the interim, and *enhanced unfairly* the Court's liberty to abort holding.

The fact of the matter is that, in the late 19th and early 20th centuries, the Courts made it quite clear that the purposes or objects of their anti-abortion statutes were to protect or safeguard *either* the Unborn Child *or* the Mother *and* the Unborn Child.[20] The Court's reliance on *Murphy* is poor because the Supreme Court of New Jersey pointed out subsequently that the statute which the *Murphy Court* construed "was further extended March 26th, 1872***to protect the life of the child***." *State v. Gedicke*, 43 N.J.L. 86, 90 (S.C.N.J., Feb. Term, 1881). (Emphasis added.) Moreover, *Murphy* appears to stand alone, *not* as an *example* of authority for the Court's statement.

3. *Unfair Portrayal of the Common Law, As Expounded by Coke, Concerning Abortion.* The Court provided an *unfair picture* of the Common Law as to abortion by referencing Cyril Means, Jr. *["The Phoenix of Abortional Freedom," etc., 17 N.Y.L.F. 335 (1971)]* and Lawrence Lader *[Abortion* (1966), pp. 78-79*]*, each of whom was active in the movement for the repeal of the

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[20] *State v. Howard*, 32 Vt. 380, 399 (S.C. Vt., 1859) (Mother and Child); *Dougherty v. People*, 1 Colo. 514, 523 (S.C. Colo., 1872) (Mother and Child); *State v. Gedicke*, 43 N.J.L. 86, 89-90 (S.C.N.J., Feb. Term, 1881) (Mother and Child); *State v. Watson*, 1 P. 770, 771, 772 (S.C. Kan., 1883) (Child); *Dietrich v. Inhabitants of Northampton*, 138 Mass. 14, 17 (S.J. Ct. Mass., 1884) (Child) (dictum in tort case); *Edwards v. State*, 112 N.W. 611, 613 (S.C. Neb., 1907) (Mother and Child); *State v. Miller*, 133 P. 878, 879 (S.C. Kan., 1913) (Mother and Child); *State v. Tippie*, 105 N.E. 75, 77 (S.C. Ohio, 1913) (Mother and Child); *State v. Ausplund*, 167 P. 1019, 1022-1023 (S.C. Ore., 1917) (Mother and Child); *Nash v. Meyer*, 31 P. 2d 273, 276 (S.C. Idaho, 1934) (Child); *Bowlan v. Lunsford*, 54 P. 2d 666, 668 (S.C. Okla., 1936) (Child); and *State v. Cox*, 84 P. 2d 357, 361 (S.C. Wash., 1938) (Mother and Child).

abortion laws.[21] Means was especially critical of Coke's statements concerning abortion.[22]

The Court should have examined Coke's abortion statements (3 *Inst.* 50-51) in light of (1) the common law precedents, beginning with the abortion cases during the reign of King John, (2) the nature of a common law crime, i.e., "acts injurious to the public morals" or "acts which are mala in se" *[Clark, Handbook of Criminal Law* (3rd ed.) (1915), pp. 24, 25*]*, and (3) how Coke was treated in this regard by English Courts and Legal Scholars. See *supra*, pp. 11-12 and footnote 13.

In this latter regard, the Court of Chancery, in describing the rights of Unborn Children, said that the destruction of an Unborn Child was "murder" *[Millar v. Turner*, 27 E. Repts. 907, 908 (Ch., 1747-1748) (preceded by a reference to 3 Coke, *Inst.* 50)*]*, and referred to the live birth murder rule described by Coke *[Beale v. Beale, supra*, 24 E. Repts. 373 and *Burdet v. Hopegood, supra*, 24 E. Repts. 484, citing the *Beale* case*]*. While Sir Matthew Hale, who was Chief Justice of the King's Bench from 1671-1676, disagreed with the live birth murder rule, he agreed that it was a "great misprison" if a woman quick with child took or another gave her "a potion to cause abortion," or if one struck her "whereby child within her is killed***." II Hale, *The History of the Pleas of the Crown* (1st Am. ed., with notes, etc. by Stokes and Ingersoll) (Phil., 1847), p. 563. The writings of William Hawkins, Thomas Wood, William Blackstone and Edward East were consistent with Coke's live birth murder and abortion statements.[23] Even the Preamble to Lord Ellenborough's Act referred to abortion and other acts as "heinous Offences," and an indictment was returned for the offense of abortion shortly before enactment in 1803 of that Act. III Chitty, *op. cit.*, pp. 798-801.

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[21] See Nathanson, *Aborting America* (N.Y., 1979), pp. 55, 154 and 174 (Means), and pp. 29-36, 47-71, 82, 85, 116, 148-157, 163, 168, 172 and 307 (Lader).

[22] The chief problem with the Means article is lack of depth. He apparently was unaware of substantial English authorities on the subject of abortion. See, e.g., footnote 13, *supra*.

[23] I Hawkins, *A Treatise of the Pleas of the Crown* (c. 1716) (Curwood,

4. *The Erroneous Implication that Only a Minority of U.S. Jurisdictions Treated the Abortion of a "Quick" Unborn Child as a Crime.* The Court said that "[t]his is of some importance [the alleged contradiction of Coke and the claim that abortion after quickening was never established as a common law crime] because while most American courts ruled, in holding or dictum, that abortion of an unquickened fetus was not criminal under their received common law, others followed Coke in stating that abortion of a quick fetus was a 'misprison,' a term they translated to mean 'misdemeanor'" (410 U.S. at 135). This made it *appear* that only a *minority* of U.S. Jurisdictions treated the abortion of a "quick" Unborn Child as a crime, and *buttressed unfairly* the Court's conclusion as to the "far freer" prevailing abortion practices in the major part of the 19th century (410 U.S. at 158).

The fact of the matter is that where the woman *was* "quick with child," *all* courts which considered the question (to Petitioners' knowledge) said that abortion was a crime, etc. at common law.[24] Where the woman was *not* "quick with child," *most* courts which considered the question said that abortion was not an offense at that stage of pregnancy. However, a *respectable minority* of U.S. courts concluded that it was an offense to abort at *any* stage of pregnancy.[25]

5. *Erroneous Claim as to When the States Generally Began To Replace the Common Law with Legislation.* The Court said that "It was not until after the war between the States that legislation

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London, 1824), ch. 13, pp. 94-95; I Wood, *An Institute of the Laws of England* (3rd ed., Holborn, Eng.) (1724), ch. 1, p. 11; I Blackstone, *Commentaries on the Laws of England* (1765), pp. 129-130; IV Blackstone, *Commentaries on the Laws of England* (c. 1769), p. 198; I East, *A Treatise of the Pleas of the Crown* (Phil., 1806), ch. V, p. 227.

[24] E.g., *State v. Steadman*, 51 S.E. 2d 91, 93 (S.C.S.C., 1948); *Commonwealth v. Parker*, *supra*, 50 Mass. at 266; *Smith v. State*, 33 Me. 48, 55, 57 (S.C. Me., 1851); *State v. Alcorn*, 64 P. 1014, 1016 (S.C. Idaho, 1901); *State v. Cooper*, 22 N.J.L. 52, 58 (S.C.N.J., 1849); *Mitchell v. Commonwealth*, 78 Ky. 204, 210 (Ct. App. Ky., Sept. Term, 1879); *State v. Stafford*, 123 N.W. 167, 168 (S.C. Iowa, 1909); see *Gray v. State*, 178 S.W. 337, 338 (Tex. Crim. App., 1915).

[25] *Mills v. The Commonwealth*, *supra*, 13 Pa. St. at 632-633; *State v. Slagle*, *supra*, 82 N.C. at 567-568, 83 N.C. at 545; *State v. Reed*, *supra*, 45 Ark. at 334-336; *Munk v. Frink*, 116 N.W. 525, 527 (S.C. Neb., 1908).

began generally to replace the common law" (410 U.S. at 139). This made it *appear* that State anti-abortion legislation was a latter-19th century development, and it *enhanced unfairly* the Court's "far freer" abortion practice view, above.

The fact of the matter is that, when the war between the State ended (April-May, 1865), there were only 36 States of the United States and, of that number, 27 States had anti-abortion statutes then in effect. See Dissenting Opinion of Justice Rehnquist in *Roe v. Wade*, 410 U.S. at fn. 1, pp. 175-176.

6. *Erroneous Use of Maternal Mortality Rates*. The Court said, "Mortality rates for women undergoing *early abortion*, when the procedure is legal, appears to be as low or lower than the rates for *normal childbirth*" (410 U.S. at 149; see p. 163). (Emphasis added.) The Court used this (1) to show that the concerns of the States in enacting their anti-abortion statutes of protecting women from a hazardous procedure were no longer valid, and (2) to support the Court's conclusion as to when the State's interest in protecting maternal health becomes "compelling."

The most significant—and apparent—problem is that the Court *misused* what it had noticed: The proper mortality comparison was *not* female deaths from "early abortions" versus female deaths from childbirth because the subjects of comparison are markedly different. Childbirth lasts 3 trimesters; "early abortions" occur in or around the first trimester. The proper procedure would be to compare the number of maternal deaths from abortion resulting from a *specified number of early abortions* with the number of maternal deaths *from early pregnancy* resulting from the *same number of pregnancies*. The Court's use of the mortality rates, in short, was palpably erroneous and unfair.[26]

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[26] The Court apparently was unaware of the facts (1) that the concept of human fertilization was not understood until after the discovery of the mammalian ovum (of a dog) in 1827 [Flanagan, *The First Nine Months of Life* (N.Y., 1962), Preface, p. 9], thereby making substantially less significant the failure of the later Common Law to cover abortions before the woman was "quick with child"; and (2) that the first anti-abortion enactment in this country was that of the New York City Common Council of July 27, 1716, which, *inter-alia*, prohibited midwives, under penalty of fines or jail terms in

D. *Important Constitutional Errors Were Made Procedurally and Substantively.* The Court made a number of constitutional errors in *Roe* and *Doe*.:[27]

1. *No Representation.* Neither Abortion "Survivor" Children nor Unborn Children threatened and endangered by abortion were represented before the U.S. District Courts or this Court in *Roe* and *Doe* (except that Unborn Children were represented for a 10-day period before the District Court in *Doe*), as they were entitled. The Judgments of all such Courts, therefore, were unconstitutional and void as to them. See U.S. Const., 5th Amendment (due process); *McArthur v. Scott, supra,* 113 U.S. at 391-392, 404 (Unborn Children); *Pennoyer v. Neff,* 95 U.S. 714, 733-734 (1878) (Citizens); Rule 19, F.R. Civ. Proc.

2. *No Personal Jurisdiction.* Neither the U.S. District Courts nor this Court had personal jurisdiction over such Unborn or Abortion "Survivor" Children (except for said 10-day period for the Unborn in the District Court in *Doe*). Yet each such category of Children was affected vitally by those proceedings, and had a right to be before the Courts through next friends or guardians. The Judgments of all such Courts, therefore, were unconstitutional and void as to them. *Ibid.*

3. *Invidious Discriminations.* The discriminations against Abortion Survivors and Unborn Children as compared to the non-aborted born and corporations are invidious. For example, corporations, which are artificial beings and not mentioned in the U.S. Constitution, are "persons" under the due process and equal protection clauses of the 14th Amendment thereof, while actual unborn human beings, recognized in law

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default of payment, from giving counsel or administering any "Herb Medicine or Potion, or any other thing to any Woman *being with Child* whereby She Should Destroy or Miscarry of that she goeth withall before her time" *[New Perspectives on Human Abortion* (ed. by Hilgers, Horan and Mall) (Frederick, Md., 1981), ch. 15, p. 199, citing "Minutes of the Common Council of New York" 3 (1712-1729): 121, at fn. 2, p. 203 (Emphasis added.)], thereby showing a serious early concern for the problem of abortion and without reference to any "quick with child" distinction.

[27] Accordingly, the Judgments and Decisions in these cases are void. See, e.g., *Windsor v. McVeigh,* 93 U.S. 274, 277-284 (1876); *Johnson v. Zerbst,* 304 U.S. 458, 467-468 (1938).

and possessive of substantial legally cognizable rights, are denied personhood. A prematurely born child of 7-month gestational age has 14th Amendment personhood while an older and more developed Unborn Child of 8-months gestational age does not. Neither the 5th nor the 14th Amendments to the U.S. Constitution can justify such crazy-quilt discriminations.

4. *Failure To Apply Pre-existing Supreme Court Decisions Concerning Human Personhood Under the 14th Amendment.* The Court failed to apply the "live," "human" and "having a being" test of 14th Amendment personhood (*Levy v. Louisiana, supra,* 391 U.S. 68) and the "biological" test of such personhood (*Glona v. American Guarantee & Liab. Ins. Co., supra,* 391 U.S. 73) to the affected Unborn Children. If such constitutional interpretive decisions can be overlooked or disregarded, how can it be maintained that a constitutional interpretive decision has "law of the land" ranking? Why were these decisions not applied in *Roe*?

5. *Failure To Apply the Constitutional Implied Rights Concept to 14th Amendment Personhood for the Unborn.* Since a born person has 14th Amendment recognition, and since such a person does not originate a birth, it follows that 14th Amendment recognition extends to such person prenatally. The person after birth is the self-same person before birth, only at a different developmental stage. The human genetic code is present at conception (Tr. 82). The implied rights cases of constitutional stature [e.g., *Griswold v. Connecticut,* 381 U.S. 479 (1965)] were misapplied on the issue of personhood.

6. *Failure To Apply Properly the Constitutional Implied Rights Concept to "Liberty" Under the 14th Amendment.* While "liberty" is a broad concept, "life" is the most basic of rights for, without it, all other rights and interests are *meaningless*. Where was the correlation between "liberty" and the right to destroy unborn life? Or the basis for the "fundamental" ranking of such right? Not only was abortion a crime at common law and in Texas and Georgia, but the legal and social heritage of this Nation viewed abortion not as a right but as a naked wrong. Moreover, the Constitution protects the life rights of persons

against certain governmental deprivations, and nowhere does it give any human being the right to destroy the life of another. If the implied rights decisions of this Court were applied properly, the life right of the Unborn would have prevailed clearly over any liberty to destroy the same.

7. *Naked Deprivation of Rights.* The due process clause of the 5th Amendment stood as a bar to this Court's holdings in *Roe* and *Doe* which endangered the rights of Abortion "Survivors" and authorized the destruction of a large body of legally cognizable rights of the Unborn. See *Marbury v. Madison*, 5 U.S. 137, 163 (1803); *Munn v. Illinois*, 94 U.S. 113, 130 (O.T., 1886).

8. *Manufacture of the Right of Abortion, Etc.* In *Roe* and *Doe*, the Court violated Article III of the U.S. Constitution by creating a constitutional liberty and by restricting the states of *their* reserved constitutional authorities to legislate in this area. This also violated the unenumerated rights of the people, as guaranteed by the 9th Amendment, and the Division of Powers Concept, as guaranteed by the 10th Amendment. See *supra*, pp. 11-13, 14; see also, e.g., *Labine v. Vincent*, 401 U.S. 532, 538-539 (1971). Procedural "due process," as applied to the Infant Victims of Abortion, was also denied, in violation of the 5th Amendment. The Abortion "Survivors," for example, were not even considered by the Court. Finally, the Court violated the supremacy clause of Article VI by authorizing the destruction of rights cognizable under federal statutory law and, in the case of Infant Texas Victims, by authorizing the destruction of constitutional status rights derived from the law of the Republic of Texas, and by permitting Rule 19, Fed. R. Civ. Proc., to be violated as to such Victims.

E. *The Court Lacked Personal Jurisdiction Over the Infant Victims of Abortion.* As shown above, the District Courts in *Roe* and *Doe* lacked personal jurisdiction over the Infant Victims of abortion (except for a 10-day period in *Doe*). This deficiency infected the review proceedings in this Court. Accordingly, all such Judgments are void. They cannot operate to deprive the Infant Petitioners—who were not even in gestation when those "Judgments" were rendered—of their rights under United States and Texas law. See *McArthur v. Scott, supra*, 113 U.S. at 391-392, 404; and *Pennoyer v. Neff, supra*, 95 U.S. at 733-734.

Appendix "A"

OPINION OF THE COURT OF APPEALS
(September 9, 1982)

REVERSED AND REMANDED IN PART;
DISMISSED IN PART
SEPTEMBER 9, 1982

NO. 10-81-072-CV

Trial Court
79-44733

IN THE
COURT OF APPEALS
FOR THE
TENTH SUPREME JUDICIAL DISTRICT OF TEXAS
AT WACO

****

REBECCA P. SCHWANECKE, M.D., F.A.A.P., ET AL,
Appellants

v.

HARRIS COUNTY HOSPITAL DISTRICT, ET AL,
Appellees

****

From 234th Judicial District Court
Harris County, Texas

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In the case of Roe v. Wade, 410 U.S. 113, 93 S. Ct. 705, 35 L. Ed 2d 147 (1973), the United States Supreme Court struck down as being unconstitutional the Texas criminal abortion statutes which were articles 1191-1194 and 1196 of the then existing Penal Code of our State. Those statutes made it a crime to "procure an abortion," as therein defined, or to attempt one, except with respect to "an abortion procured or attempted by medical advice for the purpose of saving the life of the mother." The Court held that the Texas statutes as they existed violated the right of privacy of the mother founded in the Fourteenth Amendment's concept of personal liberty and restrictions upon state action. In a companion case decided the same day, Doe v. Bolton, 410 U.S. 179, 93 S. Ct. 739, 35 L. Ed 2d 201 (1973) the Supreme Court also struck down abortion statutes of the State of Georgia. These decisions were far reaching and profoundly affected our society in the area of abortions by creating rights where none had previously been recognized. They also provided for but placed limits on State action in this area and stirred a long-existing controversy which still rages today. The Supreme Court recognized the extent of this controversy in this prefatory statement in *Roe*:

> "We forthwith acknowledge our awareness of the sensitive and emotional nature of the abortion controversy, of the vigorous opposing views, even among physicians, and of the deep and seemingly absolute convictions that the subject inspires. One's philosophy, one's experiences, one's exposure to the raw edges of human existence, one's religious training, one's attitudes towards life and family and their values, and the moral standards one establishes and seeks to observe, are all likely to influence and color one's thinking and conclusions about abortions."

Although concluding in *Roe* that the right of personal privacy includes the abortion decision, the Supreme Court also concluded "that this right is not unqualified and must be considered against important state interest in regulation." 93 S. Ct. 727. The Court then laid down these rules and restrictions upon state action in the area of abortion:

> (a) For the stage prior to approximately the end of the first trimester, the abortion decision and its effectuation must be left to the medical judgment of the pregnant woman's attending physician.
>
> (b) For the stage subsequent to approximately the end of the first trimester, the State, in promoting its interest in the health of the mother, may, if it chooses, regulate the abortion procedure in ways that are reasonably related to maternal health.
>
> (c) For the stage subsequent to viability, the State in promoting its interest in the potentiality of human life may, if it chooses, regulate, and even proscribe, abortion except where it is necessary, in appropriate medical judgment, for the preservation for the life or health of the mother. 93 S. Ct. 732.

Since the decisions in Roe v. Wade and Doe v. Bolton, the Texas Legislature has not seen fit to enact further statutes regulating abortion; and, thus, we do not have any state-wide regulatory laws on this subject.

Appellee Harris County Hospital District is a public hospital created under and existing under the provisions of article 4494n, Vernon's Tex. Civ. St. In accordance with Sec. two of the statute, the operations of appellee Hospital District are funded by taxes levied and collected by the Commissioner's Court of Harris County for that purpose. The Hospital District has a Board of Managers provided for under Sec. five of the

statute, possessing the power and authority to "promulgate rules and regulations for the operation of the hospital or hospital system."

Soon after the 1973 United States Supreme Court decisions in Roe and Doe, the Board of Mangers of Hospital District authorized the performance of abortions within the District. On March 29, 1973, the Board of Managers adopted the following policy for abortions:

> "Abortion prior to the twelfth week of pregnancy may be handled as any other medical problem. The decision to perform abortion will be left to the judgment of the physician and patient up to the twelfth week of pregnancy.
>
> "Following the twelfth week of pregnancy, consultation for abortion will be required by a member of the attending staff of the service related to the indication for abortion. Abortion after the twelfth week of pregnancy will be performed solely for medical, surgical or psychiatric indications.
>
> "No physician will be required to perform abortions if it is contrary to his own moral standards.
>
> "Further, abortions will be performed on District eligible patients only."

On June 24, 1976, the Board of Managers adopted the following change in its abortion policy:

> "The number of weeks permissible to do an abortion in the voluntary termination of pregnancy clinic [will] be twenty (20) weeks instead of the present twelve (12) weeks, and the decision to perform the abortion will be made between the physician and the patient."

On September 29, 1977, the Board of Managers expanded its abortion policy by adopting the following proposal:

"As the District's only interest is medical and health care, the matter of abortion and the right to die is a matter strictly between the doctor and his patient and should be treated as any other medical procedure the District performs."

All of the parties in this case entered into the following stipulation concerning the District's abortion policies: "Said policies were and continued to be directed to permitting the performance of abortions and abortion procedures within the facilities owned and operated by the District within the guide lines established by the above Court decisions [Roe v. Wade and Doe v. Bolton]. Pursuant to said policies, abortions and/or abortions procedures have been, are being and may be performed presently at facilities owned and operated by the District. The great majority of these abortions and abortion procedures have been and are performed usually at Jefferson Davis Hospital in a small area known as the Voluntary Termination of Pregnancy Clinic."

Harris County has not enacted any rules or regulations concerning abortions.

Appellants filed this suit by their original petition on October 11, 1979. Amendments to appellants' petition included their third amended original petition filed in April 1981, which was their trial pleading at the time of final judgment. The ultimate purpose of this suit was the issuance of a permanent injunction prohibiting the Hospital District from performing or assisting directly in the performance of any and all abortions. The defendants were Harris County, the Harris County Commissioner's Court, the individual Commissioners, the Harris County Judge, the Harris County Treasurer, and the Hospital District. The plaintiffs were Rebecca P. Schwanecke, Nancy Brecheisen, Bonnie B. Duesing, and Margit M. Win-

strom. Schwanecke sued "as Next Friend of Certain Minor Unborn Children and Certain Minor Recently Born Children, for and in behalf of such Minor Children, as a class." She sought certification of the children as a class for class suit purposes, and, upon such certification, her appointment as guardian ad litem to represent the class in this suit. Brecheisen, Duesing, and Winstrom each sued as "a Resident and Taxpayer of Harris County, Texas, as to themselves and all other Residents and Taxpayers of Harris County, Texas, similarly situated as a class." They sought to prevent the use of tax money for the performance of abortions in the Hospital District, and they pleaded for class suit certification of similarly situated taxpayers. In their individual capacities where applicable, and for their classes if certified, all appellants sought a declaration of their rights and eventually the permanent injunction previously mentioned.

Upon motion and after hearing, on June 6, 1980, the trial court dismissed defendants Harris County, Texas, and the Harris County Treasurer, from the law suit.

On August 8, 1980, appellants' motions for class action certification and appellant Schwanecke's motion for appointment as guardian ad litem for the children's class, were denied by the trial court by signed order.

In June 1981, after several hearings by the Commissioners' Court concerning the Hospital District's 1981-82 budget, the Board of Managers removed from its proposed budget funding for the VTP Clinic in Jefferson Davis Hospital, and it closed this Clinic.

On June 23, 1981, appellees filed a motion to dismiss this law suit on the ground that the closure of the VTP Clinic rendered appellants' cause of action moot. The motion was granted and on July 7, 1981, judgment was rendered "that this

cause be in all things dismissed as moot." Appellants filed their appeal bond on July 10, 1981, and this appeal resulted.

We agree with appellants that the closing of the VTP Clinic did not meet and defeat their allegations that tax-funded abortion procedures were being performed in the Hospital District. As we noticed above, appellees admitted by written stipulation that abortion procedures are being performed presently at facilities owned and operated by the District, and that the great majority of these abortion procedures were usually performed at the VTP Clinic. We therefore also agree with appellants that the closing of the Clinic did not support the judgment of dismissal of their suit as moot.

It is the duty of an appellate court to sustain the judgment of a trial court if it is correct on any theory of law applicable to the case, and this is true whether the trial court gives the correct legal reason for the judgment, or any reason at all. Gulf Land Co. v. Atlantic Refining Co., 134 Tex. 59, 131 S.W. 2d 73, 84 (1939). The failure of a plaintiff's petition to state a cause of action will support a judgment of dismissal. "But only after a party has been given an opportunity to amend after special exceptions have been sustained may the case be dismissed for failure to state a cause of action." Texas Department of Corrections v. Herring, 513 S.W. 2d 6, 10 (Tex. 1974).

It is our view that appellants have not pleaded a cause of action under existing law. Appellants theorize that they are asserting a cause of action, on behalf of unborn children and children born affected by abortion procedures on their mothers, which was not reached by the United States Supreme Court in the Roe and Doe cases. They also assert that the decisions in Roe and Doe are void as violative of the United States Constitution. Then, they contend that if these decisions are valid, they revive anti-abortion laws of the Republic of Texas "which were carried forward into the law of the State of Texas by the 1845 Annexation Accord." In Roe, the U.S.

Supreme Court noticed that the State of Texas urged, apart from the Fourteenth Amendment, that life begins at conception and is present throughout pregnancy, and that, therefore, the State has a compelling interest in protecting that life from and after conception. The court said, "We need not resolve the difficult question of when life begins. When those trained in the respective disciplines of medicine, philosophy, and theology are unable to arrive at any consensus, the judiciary, at this point in the development of man's knowledge, is not in a position to speculate as to the answer...[W]e do not agree that, by adopting one theory of life, Texas may override the rights of the pregnant woman that are at stake. 93 S. Ct. 730, 731. See also Planned Parenthood of Central Missouri v. Danforth, 428 U.S. 52, 96 S. Ct. 2831, 49 L. Ed 2d 788 (1976). Of course, these decisions of the United States Supreme Court are the law of the land, and appellants and we are bound by them. Appellants have not alleged that any abortion procedures in the Hospital District are conducted in violation of the rules of these cases, nor that they violate the abortion policy of the District. Thus appellants cannot validly argue, as they attempt to do, that taxes paid by them are being used for an illegal purpose.

Although appellants have not pleaded a cause of action, we may not sustain the judgment of dismissal on that ground because appellants have not been afforded an opportunity to amend their petition and state a cause of action if they can. Texas Department of Corrections v. Herring, supra.

Appellants also attempt on this appeal to attack the trial court's order denying their motions for class certifications and the appointment of appellant Schwanecke as guardian ad litem for the children's class, if certified. This interlocutory order was appealable at the time on August 8, 1980. Vernon's

Tex. Civ. St., art. 2250, § 3. Appellants did not perfect their appeal from this order by timely filing an appeal bond and the appellate record within the time prescribed in Rule 385(b) Vernon's Tex. Rules Civ. Proc.; and we therefore dismiss this appeal for want of jurisdiction. Buck v. Johnson, 495 S.W. 2d 291, 296 (Tex. Civ. App.—Waco 1973, no writ).

Since we must reverse the judgment of dismissal, appellants' complaint about the assessment of costs in the trial court is immaterial. Appellants' remaining points of error are overruled.

The judgment of dismissal is reversed, and this cause is remanded to the trial court. Appellants' appeal of the order denying their motions for class action certifications, and denying the appointment of appellant Schwanecke as guardian ad litem for the children's class, is dismissed for want of jurisdiction.

The costs of this appeal are assessed 50% to appellants and 50% to appellees.

ORDER NOT PUBLISHED
Rule 452, T.R.C.P.

VIC HALL
Associate Justice

Appendix "B"

JUDGMENT OF THE COURT OF APPEALS
(September 9, 1982)

BE IT REMEMBERED:

THAT at the term of the Honorable Court of Appeals for the Tenth Supreme Judicial District of the State of Texas, begun and holden at Waco on the 1st day of January, 1982, present Chief Justice FRANK G. McDONALD and Associate Justices VIC HALL and GEORGE CHASE

In the cause

No. 10-81-072-CV

Rebecca P. Schwanecke, M.D., F.A.A.P., et al, Appellants

From Harris County

v. Trial Court No. 79-44733

Opinion by Vic Hall

Harris County Hospital District, et al., Appellees

the following Judgment was entered on September 9, 1982:

"This cause came on to be heard on the transcript of the record, and the same being considered, because it is the opinion of this Court that there was error in the judgment of dismissal; it is therefore ordered, adjudged and decreed that the judgment of dismissal entered on the 7th day of July, 1981 be, and hereby is, reversed and this cause is remanded to the 234th Judicial District Court of Harris County, Texas in accordance with the opinion of this Court. It is further the opinion of this Court that the appeal of the order denying Appellants' motions for class action certifications and for appointment of guardian ad litem for the children's class should be dismissed; it is therefore ordered, adjudged and decreed

that the appeal of the order denying Appellants' motions for class action certifications and for appointment of guardian ad litem for the children's class entered on the 8th day of August, 1980 be, and hereby is, dismissed for want of jurisdiction. It is further ordered that Appellants Rebecca P. Schwanecke, M.D., F.A.A.P., et al, pay fifty per cent (50%) of the costs of appeal and that Appellees Harris County Hospital District, et al, pay fifty per cent (50%) of the costs of appeal, and this decision be certified below for observance."

I, ROBERT G. WATTS, Clerk of the Court of Appeals for the Tenth Supreme Judicial District of Texas, at the City of Waco, hereby certify that the foregoing is a true copy of the Judgment entered herein by this Court in the above entitled and numbered cause as appears of record in Minute Book 6, Page 85.

IN WITNESS WHEREOF, I hereunto set my hand and affix the seal of said Court at Waco this 12th day of May A.D. 1983.

/s/ Robert G. Watts
ROBERT G. WATTS, Clerk

Appendix "C"

ORDERS OF COURT OF APPEALS OVERRULING APPELLANTS' MOTION FOR REHEARING, FIRST AMENDED MOTION FOR REHEARING AND SECOND AMENDED MOTION FOR REHEARING

(October 7, 1982)

BE IT REMEMBERED:

THAT at the term of the Honorable Court of Appeals for the Tenth Supreme Judicial District of the State of Texas, begun and holden at Waco on the 1st day of January, 1982, present Chief Justice FRANK G. McDONALD and Associate Justices VIC HALL and GEORGE CHASE

In the cause

No. 10-81-072-CV

Rebecca P. Schwanecke, M.D., F.A.A.P., et al, Appellants

From Harris County

v. Trial Court No. 79-44733

Harris County Hospital District, et al, Appellees

the following Order was entered on October 7, 1982:

"It is ordered that Appellants' Motion for Rehearing be, and hereby is, OVERRULED."

I, ROBERT G. WATTS, Clerk of the Court of Appeals for the Tenth Supreme Judicial District of Texas, at the City of Waco, hereby certify that the foregoing is a true copy of the Order entered herein by this Court in the above entitled and numbered cause as appears of record in Minute Book 6, Page 93.

IN WITNESS WHEREOF, I hereunto set my hand and affix the seal of said Court at Waco this 12th day of May A.D. 1983.

/s/ Robert G. Watts

ROBERT G. WATTS, Clerk

BE IT REMEMBERED:

THAT at the term of the Honorable Court of Appeals for the Tenth Supreme Judicial District of the State of Texas, begun and holden at Waco on the 1st day of January, 1982, present Chief Justice FRANK G. McDONALD and Associate Justices VIC HALL and GEORGE CHASE

In the cause

No. 10-81-072-CV

Rebecca P. Schwanecke, M.D., F.A.A.P., et al, Appellants

From Harris County

v. Trial Court No. 79-44733

Harris County Hospital District, et al, Appellees

the following Order was entered on October 7, 1982:

"It is ordered that Appellants' First Amended Motion for Rehearing be, and hereby is, OVERRULED."

I, ROBERT G. WATTS, Clerk of the Court of Appeals for the Tenth Supreme Judicial District of Texas, at the City of Waco, hereby certify that the foregoing is a true copy of the Order entered herein by this Court in the above entitled and numbered cause as appears of record in Minute Book 6, Page 93.

IN WITNESS WHEREOF, I hereunto set my hand and affix the seal of said Court at Waco this 12th day of May A.D. 1983.

/s/ Robert G. Watts

ROBERT G. WATTS, Clerk

BE IT REMEMBERED:

THAT at the term of the Honorable Court of Appeals for the Tenth Supreme Judicial District of the State of Texas, begun and holden at Waco on the 1st day of January, 1982, present Chief Justice FRANK G. McDONALD and Associate Justices VIC HALL and GEORGE CHASE

In the cause

No. 10-81-072-CV

Rebecca P. Schwanecke, M.D., F.A.A.P., et al, Appellants

From Harris County

v. Trial Court No. 79-44733

Harris County Hospital District, et al, Appellees

the following Order was entered on October 7, 1982:

"It is ordered that Appellants' Second Amended Motion for Rehearing be, and hereby is, OVERRULED."

I, ROBERT G. WATTS, Clerk of the Court of Appeals for the Tenth Supreme Judicial District of Texas, at the City of Waco, hereby certify that the foregoing is a true copy of the Order entered herein by this Court in the above entitled and numbered cause as appears of record in Minute Book 6, Page 93.

IN WITNESS WHEREOF, I hereunto set my hand and affix the seal of said Court at Waco this 12th day of May A.D. 1983.

/s/ Robert G. Watts

ROBERT G. WATTS, Clerk

Appendix "D"

ORDERS OF SUPREME COURT OF TEXAS REFUSING APPLICATION FOR WRIT OF ERROR [NO REVERSIBLE ERROR] AND OVERRULING MOTION FOR REHEARING
(March 30, 1983 and May 4, 1983)

IN THE SUPREME COURT OF TEXAS

No. C-1711 March 30, 1983

Rebecca P. Schwanecke, M.D., F.A.A.P. et al.
vs.
Harris County Hospital District et al.

From Harris County, Tenth District.

Application of petitioners for writ of error to the Court of Appeals for the Tenth Supreme Judicial District having been duly considered, and the Court having determined that the application presents no error requiring reversal of the judgment of the Court of Civil Appeals, it is ordered that said application be, and hereby is, refused.

It is further ordered that applicants, Rebecca P. Schwanecke, M.D., F.A.A.P., et al., pay all costs incurred on this application.

No. C-1711 May 4, 1983

Rebecca P. Schwanecke, M.D., F.A.A.P. et al.)
)
vs.)
)
Harris County Hospital District et al.)

From Harris County, Tenth District.

Petitioners' motion for rehearing of application for writ of error having been duly considered, it is ordered that said motion be, and hereby is, overruled.

I, GARSON R. JACKSON, Clerk of the Supreme Court of Texas, do hereby certify that the above and foregoing is a true and correct copy of the orders of the Supreme Court of Texas in the case numbered and styled as above, as the same appears of record in the minutes of said Court under the dates shown.

WITNESS my hand and seal of the Supreme Court of Texas, at the City of Austin, this, the 9th day of May, 1983.

GARSON R. JACKSON, Clerk

By /s/ Mary M. Wakefield, Deputy.

Mary M. Wakefield

Appendix "E"

U.S. CONSTITUTIONAL AND TEXAS ANNEXATION ACCORD PROVISIONS INVOLVED

I. *U.S. CONSTITUTION:*

Article III:

Section 2. The judicial Power shall extend to all cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;***.

In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be a Party, the supreme Court shall have original Jurisdiction. In all the other Cases before mentioned, the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make.

Article VI, Second Paragraph:

This Constitution, and the laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

5th Amendment:

[N]or shall any personbe deprived of life, liberty, or property, without due process of law;***.

9th Amendment:

The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.

10th Amendment:

The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

14th Amendment:

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside.*** [N]or shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

II. *TEXAS ANNEXATION ACCORD (1845):*

The 1845 Annexation Accord between the Republic of Texas and the United States embraced the following pertinent legal materials or excerpts thereof:

A. **Joint Resolution of the U.S. Congress, approved March 1, 1845** (5 *U.S. Stat.* 797-798):

Resolved, by the Senate and House of Representatives of the United States of America in Congress assembled, That Congress doth consent that the territory properly included within, and rightly belonging to the Republic of Texas, may be erected into a new State, to be called the State of Texas, with a republican form of government, to be adopted by the people of said Republic, by deputies in convention assembled, with the consent of the existing government, in order that the same may be admitted as one of the States of this Union.

2. *And be it further resolved,* That the foregoing consent of Congress is given upon the following conditions, and with the following guarantees, to wit: *First.* Said State to be formed, subject to the adjustment by this government of all questions of boundary that may arise with other governments; and the Constitution thereof, with the proper evidence of its adoption

by the people of said Republic of Texas, shall be transmitted to the President of the United States, to be laid before Congress for its final action, on or before the first day of January, one thousand eight hundred and forty-six. *Second.* Said State, when admitted into the Union, after ceding to the United States all public edifices, fortifications, barracks, ports and harbors, navy and navy-yards, docks, magazines, arms, armaments, and all other property and means pertaining to the public defense belonging to the said Republic of Texas, shall retain all the public funds, debts, taxes, and dues of every kind, which may belong to or be due and owing said Republic: and shall also retain all the vacant and unappropriated lands lying within its limits, to be applied to the payment of the debts and liabilities of said Republic of Texas, and the residue of said lands, after discharging said debts and liabilities, to be disposed of as said State may direct; but in no event are said debts and liabilities to become a charge upon the government of the United States. *Third.* New States, of convenient size, not exceeding four in number, in addition to said State of Texas, and having sufficient population, may hereafter, by the consent of said State, be formed out of the territory thereof, which shall be entitled to admission under the provisions of the Federal Constitution. And such States as may be formed out of that portion of said territory lying south of thirty-six degrees thirty minutes north latitude, commonly known as the Missouri Compromise Line, shall be admitted into the Union, with or without slavery, as the people of each State asking admission may desire. And in such State or States as shall be formed out of said territory north of said Missouri Compromise Line, slavery, or involuntary servitude, (except for crime), shall be prohibited.

B. **Joint Resolution of the Ninth Congress of the Republic of Texas, approved June 23, 1845** (2 Gam., *The Laws of Texas* (1225-1227):

Whereas, the Government of the United States hath proposed the following terms, guarantees, and conditions, on which the people and territory of the Republic of Texas may be erected into a new State, to be called the State of Texas, and admitted as one of the States of the American Union, to wit:

* * *

[Terms of Resolution of U.S. Congress, above]

And whereas, by said terms, the consent of the existing government of Texas is required—Therefore,

Be it resolved by the Senate and House of Representatives of the Republic of Texas in Congress assembled, That the government of Texas doth consent, that the People and territory of the Republic of Texas, may be erected into a new State, to be called the State of Texas, with a republican form of Government, to be adopted by the People of said Republic, by Deputies in Convention assembled, in order that the same may be admitted as one of the States of the American Union; and said consent is given on the terms, guarantees, and conditions set forth in the Preamble to this Joint Resolution.

Sec. 2. Be it further resolved, That the proclamation of the President of the Republic of Texas, bearing date May fifth, eighteen hundred and forty-five, and the election of Deputies to sit in Convention, at Austin, on the fourth day of July next, for the adoption of a Constitution for the State of Texas, had in accordance therewith, hereby receives the consent of the existing Government of Texas.

Sec. 3. Be it further resolved, That the President of Texas is hereby requested immediately to furnish the Government of the United States, through their accredited Minister near this

Government, with a copy of this Joint Resolution; also to furnish the Convention to assemble at Austin, on the fourth of July next, a copy of the same—And the same shall take effect from and after its passage.

C. **An Ordinance approved on July 4, 1845, by the People of the Republic of Texas in Convention at Austin, Texas** (2 Gam., *The Laws of Texas* 1228-1230):

Whereas the Congress of the United States of America has passed resolutions providing for the annexation of Texas to that Union, which resolutions were approved by the President of the United States on the first day of March one thousand eight hundred and forty-five; and whereas the President of the United States has submitted to Texas the first and second sections of the said resolution, as the basis upon which Texas may be admitted as one of the States of the said Union; and whereas the existing government of the Republic of Texas has assented to the proposals thus made, the terms and conditions of which are as follows,

* * *

[Terms of the Resolution of the U.S. Congress, above]

Now, in order to manifest the assent of the people of this Republic as required in the above recited portions of the said resolutions; We the deputies of the people of Texas in convention assembled in their name and by their authority, do ordain and declare, that we assent to, and accept the proposals, conditions and guarantees contained in the first and second sections of the resolution of the Congress of the United States aforesaid.

D. **Texas Constitution of 1845** (3 *Ver. Tex. Constitution*):

ARTICLE VII:

SEC. 20. The rights of property and of action, which have been acquired under the Constitution and laws of the Republic

of Texas, shall not be divested; nor shall any rights or actions which have been divested, barred, or declared null and void, by the Constitution and laws of the Republic of Texas, be re-invested, revis[v]ed, or re-instated, by this Constitution; but the same shall remain precisely in the situation which they were before the adoption of this Constitution.

ARTICLE XIII:

SEC. 3. All laws and parts of laws now in force in the Republic of Texas, which are not repugnant to the Constitution of the United States, the joint resolutions for annexing Texas to the United States, or to the provisions of this Constitution, shall continue and remain in force, as the laws of this State, until they expire by their own limitation, or shall be altered or repealed by the Legislature thereof.

SEC. 13. The ordinance passed by the Convention on the fourth day of July, assenting to the overtures for the annexation of Texas to the United States, shall be attached to this Constitution, and form a part of the same.

E. **Joint Resolution for the Admission of the State of Texas into the Union, approved on December 29, 1845** (9 *U.S. Stat.* 108):

Whereas the Congress of the United States, by a joint resolution approved March the first, eighteen hundred and forty-five, did consent that the territory properly included within, and rightfully belonging to, the Republic of Texas, might be erected into a new State, to be called *The State of Texas*, with a republican form of government, to be adopted the people of said republic, by deputies in convention assembled, with the consent of the existing government, in order that the same might be admitted as one of the States of the Union; which consent of Congress was given upon certain conditions specified in the first and second sections of said

joint resolution; and whereas the people of the said Republic of Texas, by deputies in convention assembled, with the consent of the existing government, did adopt a constitution, and erect a new State with a republican form of government, and, in the name of the people of Texas, and by their authority, did ordain and declare that they assented to and accepted the proposals, conditions, and guaranties contained in said first and second sections of said resolution; and whereas the said constitution, with the proper evidence of its adoption by the people of the Republic of Texas, has been transmitted to the President of the United States and laid before Congress, in conformity to the provisions of said joint resolution: Therefore—

Resolved by the Senate and House of Representatives of the United States of America in Congress asembled, That the State of Texas shall be one, and is hereby declared to be one, of the United States of America, and admitted into the Union on an equal footing with the original States in all respects whatever.

Sec. 2. *And be it further resolved,* That until the representatives in Congress shall be apportioned according to an actual enumeration of the inhabitants of the United States, the State of Texas shall be entitled to choose two representatives.

Approved, December 29, 1845.